RECORD AND BRIEFS.

Supreme Court, U.S.
FILED
SEP 22 2017
OFFICE OF THE CLERK

No. 16-980

IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE; NORTHEAST OHIO COALITION FOR THE HOMELESS; LARRY HARMON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR AMICUS CURIAE LIBERTARIAN NATIONAL COMMITTEE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Libertarian Party, the third-largest political party in the United States, was founded in 1971 to promote the principles of liberty set forth in the Declaration of Independence and United States Constitution. The Libertarian Party's interests are frequently implicated by state election laws, including those that burden candidates and voters for disapproving or straying outside of the Democratic and Republican duopoly. Accordingly, the Libertarian Party and its state affiliates

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of amicus briefs in this case are on file with the Clerk.

have repeatedly presented their views on such issues to this Court, both as a party (for example, in *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442 (2008), and *Clingman* v. *Beaver*, 544 U.S. 581 (2005)) and as an amicus (for example, in *Burdick* v. *Takushi*, 504 U.S. 428 (1992), *Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986), and *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983)).

The Libertarian National Committee's interest in this case is twofold.

First, this case implicates the Libertarian Party's cherished values. The Party's core commitment is to individual liberty; it opposes government rules and restrictions that burden liberty, and it seeks to advance legal rules that promote individual freedom, including in the political realm. Here, Ohio has implemented a rule that punishes voters who choose not to vote. Government should not be in the business of burdening or disadvantaging citizens based on their political activities or their principled decisions about how to engage in democracy.

Second, the Ohio rule at issue here disproportionately burdens the rights of Libertarian Party supporters and others who are unhappy with the choices provided by the two-party system. Libertarian Party members and voters are particularly likely to engage in principled non-voting in cases where a particular election, or even election cycle, does not include any Libertarian Party candidates. The Ohio rule at issue here removes Libertarian Party voters from the rolls who engage in that form of political expression, stymieing their ability to participate in politics in myriad ways.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises under the National Voter Registration Act. But the Ohio policy at issue—a "use-it-or-lose it" rule whereby a registered voter is deemed "inactive," commencing a process that can result in the voter being purged from the voter rolls, because he or she did not vote during a single election cycle—also raises serious constitutional concerns. The Ohio policy is inconsistent with constitutional principles because it burdens a registered voter's principled decision *not* to cast a ballot—a right that sounds in the First Amendment.

This Court has long acknowledged that in our unique form of self-government, voting implicates First Amendment principles. *See, e.g.*, *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968). Indeed, the First Amendment's protections are particularly important in the context of political freedoms and core acts of political expression. *See, e.g.*, Meiklejohn, *Free Speech and Its Relation to Self-Government* 26 (1948). Moreover, First Amendment rights typically are bilateral, encompassing both the right to engage in protected activity *and* the right to refrain from it. *See, e.g.*, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 647-648 (2000). That is true for the right not to vote. Voters can and do make principled, political decisions to sit out particular election cycles based on their political beliefs. They may do so to express disapproval with the candidates or with the process. Commencing a process to remove voters from the rolls because they did not vote in a single election cycle undermines voters' ability to take this type of political action, penalizes them for their acts of political expression, and is akin to forced political activity.

Ohio's policy severely burdens voters' political rights. Ohio's rule means that principled non-voters—citizens who register their displeasure with the lack of choices presented in particular election cycles by not voting, including citizens who are members or supporters of "third parties" like the Libertarians—can ultimately be purged from the voter rolls by the State for expressing their political views. The voter is first formally marked as "inactive" for not voting in a single election. After that, the voter will be sent a confirmation card by the State at whatever address the State has on file for that voter. Whether or not the voter actually receives the card,[2] if the voter has not either returned it, or voted, by the end of the subsequent two election cycles, the voter is purged from Ohio's voter registration file.

The harms flowing from Ohio's rule are significant. Once removed from the rolls, the now-unregistered voter is ineligible to sign ballot access petitions under state law (*i.e.*, unable to help their preferred candidates, parties, and initiatives make it onto the ballot in future elections), unable to be identified and contacted by candidate campaigns that rely on the state's voter registration records, and invisible to pollsters and others who measure public opinion by seeking the views of registered voters.

Ohio's "use-it-or-lose-it" rule tangibly and particularly disadvantages the State's "third-party" voters,

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[2] Ohio's reliance on mailed confirmation cards is inherently problematic. Among other things, there is no guarantee that the confirmation notice will ever be received. The likelihood of successful delivery is particularly low for certain groups—including, for example, homeless individuals. *See, e.g.*, Dist. Ct. Dkt. 9-3 ¶ 18 ("Homeless individuals often do not have an address where they can reliably receive mail[.]").

including supporters of the Libertarian Party (150,000 of whom voted for a Libertarian candidate for President in 2016 in Ohio alone). Limiting the political rights of certain voters because they have chosen to express disdain for a process that quite often, all the way down the ballot, offers too few meaningful choices, and that often disadvantages "third parties" in favor of the Democratic and Republican duopoly, is inconsistent with First Amendment principles.

This Court generally interprets statutes to avoid serious constitutional problems "unless [the] construction is plainly contrary to the intent of Congress," *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), which is not the case here, as Congress believed that the National Voter Registration Act protected a citizen's principled decision not to vote in given elections. The potential conflict between Ohio's policy and fundamental First Amendment principles thus provides yet another reason to affirm the judgment below.

ARGUMENT

I. OHIO'S RULE SIGNIFICANTLY BURDENS PROTECTED POLITICAL ACTIVITY AND CONTRAVENES FIRST AMENDMENT PRINCIPLES

A. The First Amendment Protects The Right To Vote

The Constitution protects citizens' right to engage in political activity, including, and especially, the right to vote. This Court has repeatedly declared that "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1440-1441 (2014) (plurality opinion); *see also, e.g., Illinois Bd. of Elec-*

tions v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."); *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964) ("[T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."); *United States* v. *Classic*, 313 U.S. 299, 318 (1941) (the Constitution guarantees "[t]he right to participate in the choice of representatives for Congress"). The right to vote, like the right to express one's political beliefs more broadly, "is personal"—a core aspect of individual freedom within our system of self-government. *Reynolds*, 377 U.S. at 561 (internal quotation marks omitted).

Multiple constitutional provisions help safeguard the basic right to participate in our political system. *E.g.*, *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (property requirement for participation in local elections struck down under Fourteenth Amendment); *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939) (grandfather clause struck down under Fifteenth Amendment). But the First Amendment plays a particularly critical role. That is because freedom of expression, *especially* with respect to political matters, is a foundational element of democratic self-government. *See First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 n.12 (1978) ("'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" (quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964)). As Professor Meiklejohn famously wrote, "The principle of the freedom of speech springs from the necessities of the program of self-government." Meiklejohn, *Free Speech and Its Relation to Self-Government* 26 (1948) (cited in, *inter alia*, *Bellotti*, 435 U.S. at 777 n.11). Or, as Chief Justice Warren put it: "Our form of government is built on the premise that

every citizen shall have the right to engage in political expression and association." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250-251 (1957) (plurality opinion).

Accordingly, this Court has acknowledged that the First Amendment protects the right to vote. *See Burdick* v. *Takushi*, 504 U.S. 428, 433-438 (1992) (recognizing First Amendment interest in the right to vote);[3] *Lubin* v. *Panish*, 415 U.S. 709, 722 (1974) (Douglas, J., concurring) ("[T]he right to vote in state elections is one of the rights historically 'retained by the people' by virtue of the Ninth Amendment as well as included in the penumbra of First Amendment rights."); *Storer* v. *Brown*, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting) ("The right to vote derives from the right of association that is at the core of the First Amendment[.]"); *cf. Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968) (noting that "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters ... to cast their votes effectively" are "different, although overlapping, kinds of rights"); Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Cal. L. Rev. 1209, 1255 & n.260 (2003) ("[T]he First Amendment protects an indi-

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[3] *Burdick* explained that strict scrutiny is not the appropriate analysis for every state law governing the electoral process. 504 U.S. at 433, 438 (noting that "the right to vote in any manner and the right to associate for political purposes through the ballot are [not] absolute" and that "[a]ttributing to elections a more generalized expressive function" such that strict scrutiny would apply in all cases "would undermine the ability of States to operate elections fairly and efficiently"). But amicus's argument here does not depend on the application of strict scrutiny. Indeed, under the flexible *Anderson-Burdick* framework, *id.* at 434, the burdens placed on the right to vote by Ohio's rule are substantial and not justified. *See infra* Part I.C.

vidual's right to associate politically through the vote and otherwise.") (collecting cases).[4]

Importantly, this Court has also acknowledged that the right to vote is a First Amendment concern in no small part *because* voting and participation in the electoral process are acts of fundamental political expression and association. *See, e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780, 787-788 (1983) ("The exclusion of candidates ... burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens."); *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (explaining that there is a "First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views"); *see also* Winkler, *Expressive Voting*, 68 N.Y.U. L. Rev. 330, 333 (1993) (explaining that voting is "essentially an expressive exercise" and that "[b]y

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[4] Furthermore, because the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth* v. *United States*, 354 U.S. 476, 484 (1957), and its protections "safeguard[] an individual's right to participate in the public debate through political expression and political association," *McCutcheon*, 134 S. Ct. at 1448 (plurality opinion), this Court has similarly applied its protections to activities beyond voting that are intended to influence the outcome of elections. In addition to the aggregate limits on campaign contributions at issue in *McCutcheon*, *id.*, for example, this Court has concluded that "the compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment," *Doe* v. *Reed*, 561 U.S. 186, 194 (2010), and that the First Amendment protects the "right of citizens to create and develop new political parties," *Norman* v. *Reed*, 502 U.S. 279, 288 (1992).

voting, the individual shows something of herself, displaying desires, beliefs, judgments, and perceptions"); *cf. Bellotti*, 435 U.S. at 777 nn.11-12 (discussing connection between freedom of expression and association and self-government, and citing authorities).[5]

In sum, the right to vote and the right to freedom of expression and association converge around the same basic prerogatives: In our form of government, all citizens are given wide latitude to express their political views, and are entitled to "hav[e] a voice in the election of those who make the laws." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964).

B. The First Amendment Likewise Protects The Right Not To Vote

The right to vote in turn encompasses the right *not* to vote. Just as the right to vote gives each citizen a voice in deciding for themselves which candidates best reflect their values, that right necessarily implies a corollary right to decide that *no* candidate reflects their values (or for that matter, that the entire selection process was insufficient and flawed). According citizens a meaningful voice in our democracy means respecting their right to choose not to vote as a matter of principled belief and free political expression and as a statement of political identity.

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[5] First Amendment protection for the right to vote is also consistent with this Court's longtime recognition that the First Amendment carves out a "sphere of intellect and spirit" that is protected from "official[s], high or petty, ... prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion or forc[ing] citizens to confess by word or act their faith therein." *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). The fundamental individual autonomy safeguarded by the First Amendment is nowhere more important than in matters of self-government and political expression. *See supra* pp. 6-7.

1. The First Amendment safeguards a citizen's personal choice of whether to engage in protected activity

First Amendment rights typically include the right to engage or not engage in protected activities. An individual enjoys not just the ability to associate with others, but also the "'freedom *not* to associate.'" *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000) (emphasis added). He or she has the right not just "to speak freely," but also to "refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). He or she has the right to worship as he or she chooses, which includes within it the right not to worship. *Wallace* v. *Jaffree*, 472 U.S. 38, 53 (1985).[6]

That makes sense, because individual free will and freedom of choice are "at the heart of the First Amendment." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977); *see also, e.g.*, *Faretta* v. *California*, 422 U.S. 806, 833-834 (1975) ("[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." (citing U.S. Const. amend. I)); *cf.* Blocher, *The Right Not to Keep or Bear Arms*, 64 Stan. L. Rev. 1, 18 (2012) (arguing that a so-called "'choice right'" "arise[s] where the constitutional values under-

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[6] The same is true of rights guaranteed by other provisions of the Constitution. For example, individuals have a right to counsel in criminal proceedings, but also a right to refuse counsel and appear *pro se* instead. *See McKaskle* v. *Wiggins*, 465 U.S. 168, 176-177 (1984) (right to proceed *pro se* "exists to affirm the dignity and autonomy of the accused"); *Faretta* v. *California*, 422 U.S. 806, 834 (1975) ("The right to defend is personal."). They have the right to decide not just whom to marry, but also *whether* to marry at all. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2597 (2015) (describing such "personal choices" as "central to individual dignity and autonomy").

lying the right are furthered by protecting the decision *whether* to engage in the enumerated activity, and not simply by protecting the activity itself").

This Court has illustrated the point again and again, in the context of the First Amendment rights to freedom of association, freedom of speech, and freedom of religion.

With respect to freedom of association, it has explained that the First Amendment "protects 'the freedom to join together in furtherance of common political beliefs,'" but further noted that "a corollary of the right to associate is the right not to associate." *California Democratic Party* v. *Jones*, 530 U.S. 567, 574-575 (2000); *see also Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate."). This established corollary right not to associate is premised on the First Amendment's bedrock concern: freedom from governmental coercion in any form. *See Boy Scouts of Am.*, 530 U.S. at 648 ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.").

This Court has been equally clear that freedom of speech includes the freedom to be silent: "[O]ne who chooses to speak may also decide what not to say[.]" *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted); *see also Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 559 (1985) ("'[F]reedom *not* to speak publicly ... serves the same ultimate end as freedom of speech in its affirmative aspect.'"). Here, too, the freedom *not* to act is grounded in the First Amendment's underlying concern for "'individual free-

dom of mind.'" *Wooley*, 430 U.S. at 714; *accord Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."). Indeed, the freedom not to speak protects "the autonomy to choose the content of [one's] own message," *Hurley*, 515 U.S. at 573, because for some citizens, and in some contexts, silence is the most salient message. *E.g.*, *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 646 (1943) (upholding the "freedom ... to be vocal or silent according to [one's] conscience or personal inclination").

Likewise, with respect to the freedom of religion, this Court has expressly held that the First Amendment must "embrace[] the right to select any religious faith or none at all." *Wallace*, 472 U.S. at 53. Here too, the freedom of conscience required by the First Amendment allows nothing less than complete freedom of choice—including the freedom to choose nothing at all. *See, e.g.*, *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 876 (2005) (First Amendment "protect[s] the integrity of individual conscience in religious matters"); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) (First Amendment prevents government from "forc[ing] a person 'to profess a belief or disbelief in any religion'").

First Amendment freedoms—to associate, to speak, to worship—are premised on the individual's fundamental freedom of conscience, and such freedom is violated not only by denying an individual the right to engage in those activities, but also by *compelling* him or her to do so. The underlying principle is beyond cavil: "[I]n a free society one's beliefs should be shaped

by his mind and his conscience rather than coerced by the State." *Abood*, 431 U.S. at 235.[7]

2. First Amendment freedoms include the right to engage in principled non-voting

Just as it does in the contexts of association, speech, and religion, the First Amendment's fundamental protection of freedom of conscience amply supports a right not to vote as a corollary to the established right to vote. As amicus knows well, voters may have many reasons to engage in principled non-voting, *i.e.*, to intentionally abstain from the electoral process for a given election. Coercing them to vote, on pain of losing their registration and other valuable political rights if they choose to abstain from the electoral process, *see infra* Part I.C, is as antithetical to First Amendment principles as forced speech or association. *Cf. Abood*, 431 U.S. at 235.

When a registered voter shows up to the polls and casts a ballot, he or she is expressing some measure of support for the electoral process and the choices offered on that particular ballot. Even if voters secretly undervote or even turn in a blank ballot, they are making their presence known to the local community, *see* Ohio Rev. Code §§ 3501.01(R), 3501.18(A), 3501.29(A) (providing that Ohio voters must generally appear and vote in person at a particular, designated "public building[]" in their local community), and the fact of their vote will be made public in the voter file, *see id.* § 3503.15(G)(1)(a)(iv) ("voter's voting history" is public-

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[7] *See also, e.g.*, Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 Tul. L. Rev. 163, 190 (2002) ("The protection against compelled expression is grounded primarily in concerns for individual liberty underlying freedom of speech.").

ly available on Secretary of State's website).[8] Oft-cited statistics on voter turnout will count them as participants in gauging the level of public support for the choices of candidates, parties, and policies offered by the electoral process.[9] In these ways, the act of voting itself constitutes core political expression. *See also supra* Part I.A.

Non-voting similarly can be a principled, core act of political expression. An otherwise engaged voter might choose to stay home to protest some perceived unfairness in the electoral process, to register his or her discontent with a narrow set of choices, or to express displeasure with the sheer number of uncontested or "safe" races.[10] Indeed, the latter phenomenon is empirically verifiable: Turnout drops off where races

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[8] *See also* Ohio Secretary of State, *Voter Files Download Page* (providing Ohio voter file including participation history for state elections going back to 2000), https://www6.sos.state.oh.us/ords/f?p=111:1.

[9] *See, e.g.*, Desilver, *U.S. trails most developed countries in voter turnout*, Pew Research Center (May 15, 2017) (measuring turnout based on voting age population and registered voters and explaining differences in metrics), http://www.pewresearch.org/fact-tank/2017/05/15/u-s-voter-turnout-trails-most-developed-countries/.

[10] *See, e.g.*, *Michigan State UAW Cmty. Action Program Council* v. *Austin*, 198 N.W.2d 385, 388 (Mich. 1972) (noting, in decision striking down voter purge law, that "there are numerous legitimate reasons why a voter might not vote," including as "a conscious protest against all of the candidates in a particular election"); Blomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 Fordham L. Rev. 1015, 1023 (1995) ("An alienated voter does not like any candidate enough to vote and thus abstains with a distinct purpose in mind. That purpose is to voice discontent with the system or with the choice of candidates presented by that system." (citing Enelow & Hinich, *The Spatial Theory of Voting: An Introduction* 90 (1984))).

are uncompetitive, as voters use their feet to express their displeasure.[11] That phenomenon has only become more salient as the number of "safe" (and often gerrymandered) legislative districts grows, and the number of truly competitive seats declines.[12]

Indeed, one of the respondents in this very case chose not to vote in the 2012 presidential election—a decision that commenced Ohio's punitive process and ultimately led to his removal from the voter rolls—for precisely this kind of principled reason. *See* Dist. Ct. Dkt. 9-4 ¶ 6 ("In 2012, I was disillusioned with the candidates and the political process, so I decided to abstain from voting, which was my own way of having my voice heard.").

Principled non-voting, *i.e.*, non-voting that expresses a message, is particularly familiar to amicus. Especially for voters who tend to support candidates outside of the two major parties, principled non-voting is a natural means of criticizing a political system whose rules often promote the Republican and Democratic duopoly at the expense of broader choices at the

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[11] *See, e.g.*, Nonprofit Vote, *America Goes To The Polls 2016* 6-7 (noting that "[a]mong the most common reasons voters cite for not voting are a lack of competition and meaningful choices on the ballot"), http://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf.

[12] *See, e.g.*, Lieb, *Democracy with no choices: Many candidates run unopposed*, Denver Post, June 25, 2017 (noting that in 2016, 42 percent of all state legislative elections were uncontested in the general election), *available at* http://www.denverpost.com/2017/06/25/candidates-run-unopposed-voting/; FairVote, *The Rise of Safe Seats? The Relative Impact of Redistricting and "The Big Sort"* 1 (Nov. 2013) (charting decline of competition and rise of "safe, one-party" districts in congressional elections), https://fairvote.app.box.com/v/Redistricting-2014.

ballot box. For a registered Libertarian or other "third-party" supporter, principled non-voting may be an effective and clear way to protest unfair rules that prevent Libertarian or other candidates from being included in televised or broadcast debates, or ballot access rules that give major parties an automatic place on the ballot but make independent candidates and smaller parties work many times harder for the same privilege. Just as voting conveys, in myriad ways, baseline support for the electoral process, non-voting conveys dissatisfaction in a manner that is visible to community members, in the State's voter registration records, and in turnout statistics.[13] In short, and as explained in more detail below: It means something when a *registered voter* in particular chooses to stay home.

Consistent with that expressive meaning, courts explicitly have recognized a protected right not to vote. *See Michigan State UAW Cmty. Action Program Council* v. *Austin*, 198 N.W.2d 385, 387-388 (Mich. 1972) (striking down voter purge law based on constitutional "right not to vote"); *see also Beare* v. *Smith*, 321 F. Supp. 1100, 1102, 1103 (S.D. Tex. 1971) ("[I]t must be said that there is also a right not to vote."), *aff'd*, 498 F.2d 244 (5th Cir. 1974) (per curiam). Others have similarly acknowledged the right not to support particular

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[13] For this reason, it is no response to suggest that voters can simply come to the polls and cast a blank ballot. Doing so papers over the primary message of many principled non-voters; by casting a ballot, they show themselves at the polling place and are marked in the state's voter file as having participated in the electoral process, even though it is a process that they do not support. The fact that principled non-voters may send a partial, diluted version of their message by under-voting on the ballot does not ameliorate those basic problems. The Constitution provides them with more, *i.e.*, the right to send an unfiltered version of their political message without governmental interference or punishment.

candidates. *Dixon* v. *Maryland State Admin. Bd. of Election Laws*, 878 F.2d 776, 782-783 (4th Cir. 1989) ("[T]he right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable."); *see also Galli* v. *New Jersey Meadowlands Comm'n*, 490 F.3d 265, 273 (3d Cir. 2007) ("A citizen's right not to support a candidate is just as relevant for First Amendment purposes as her right to support one."). Still others have held that a State may not restrict the right to vote based on non-participation in a previous election, because doing so would amount to compelled speech—also highlighting the expressive nature of the decision to vote or not to vote. *See In re Hickenlooper*, 312 P.3d 153, 158-159 (Colo. 2013) (holding that state law requirement providing that voter could only vote for successor in recall election if he or she had voted in earlier election "unconstitutionally compel[led] voters to express a view on the question of whether to recall an elected official, ... even if she categorically opposes the recall mechanism, or, more benignly, has no opinion on whether a candidate should be recalled"); *see also Partnoy* v. *Shelley*, 277 F. Supp. 2d 1064, 1071 (S.D. Cal. 2003) (reaching same conclusion with respect to state law that counted votes on question of who should succeed recalled state officer only if on the same ballot voter had also voted on the question of whether the officer should be recalled).[14]

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[14] *See also, e.g.*, *Ayers-Schaffner* v. *DiStefano*, 37 F.3d 726, 727, 729 (1st Cir. 1994) (where local government sought to limit the universe of people eligible to vote in curative election to the people who had voted in the initial election, held that such a course was "transparently unconstitutional" and that "depriving a qualified voter of the right to cast a ballot because of failure to vote in an earlier election is almost inconceivable"); *Bauer* v. *Souto*, 896 A.2d 90, 97 n.14 (Conn. 2006) ("There is nothing in our law or in

Indeed, Congress, too, thought there was a right not to vote when it drafted the National Voter Registration Act—which is why the provision on which respondents brought suit exists in the first place. *See, e.g.*, S. Rep. No. 103-6, at 17 (1993) ("The Committee recognizes that while voting is a right, people have an equal right not to vote, for whatever reason."); *see also* 139 Cong. Rec. 9204, 9225 (May 5, 1993) (Rep. Hoyer) (voters under the NVRA are "guaranteed the right not to vote"); 139 Cong. Rec. 4789, 4852 (Mar. 11, 1993) (Sen. Ford) ("Let it be the choice of individual citizens not to vote if that is their choice, but be registered and vote if they want to."); 139 Cong. Rec. 2427, 2461 (Feb. 4, 1993) (Rep. Fazio) ("Every citizen has the right to choose not to vote."); S. Rep. No. 103-6, at 17 ("No other rights guaranteed to citizens are bound by the constant exercise of that right. We do not lose our right to free speech because we do not speak out on every issue." (quoting Rev. Jesse Jackson)).

The choice of whether or not to vote sends a message about how a citizen views both the electoral process and the choices presented through that process in a given cycle. The Constitution protects citizens' right to make that choice freely, without fear of penalty. Although the government enjoys some leeway to regulate the electoral process, "[r]easonable regulation of elections *does not* require voters to espouse positions that they do not support." *Burdick*, 504 U.S. at 438. Coercing citizens to vote does just that. Ohio's "use-it-or-lose it" rule, like other types of forced political activity, offends the First Amendment.

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our democratic traditions to suggest that, if a voter does not vote in an election, he or she waives his right to do so when the results of that election prove unreliable and a court orders a new election.").

C. Ohio's Rule Places Real And Weighty Burdens On Principled Non-Voting

Ohio's policy imposes a number of burdens on principled non-voters who are removed from the rolls for exercising their right not to vote. Most obviously, these voters are forced to bear the cost and inconvenience of re-registering as a price for expressing their political views. But the policy burdens these voters in a number of other ways as well, all of which will be felt by a voter even if he or she is able to re-register in time to cast a ballot in the next election. Under the flexible balancing analysis employed by this Court in analyzing state election laws, these significant burdens on Ohioans' political rights must be carefully weighed against the interests the State offers to justify those burdens. *E.g.*, *Burdick*, 504 U.S. at 434; *Crawford* v. *Marion Cnty. Elec. Bd.*, 553 U.S. 181, 190-191 (2008) (Stevens, J., announcing the judgment of the Court) (the "balancing approach ... weigh[s] the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule"). Applying that balancing test here only heightens the constitutional concerns with Ohio's "use-it-or-lose-it" rule.

First, and perhaps most importantly, Ohio's rule strips citizens of their ability to sign petitions that get independent and smaller-party candidates (and initiatives, recalls, and virtually any other item to be voted on) onto the ballot. That right belongs *only* to registered voters. *See* Ohio Rev. Code § 3501.38(A). For Libertarian Party members and supporters, who all too often find no Libertarian Party candidates on the ballot, that loss of a basic political right under state law is particularly harmful. Indeed, the irony is that many supporters of the Libertarian Party and other "third

parties" would be more likely to forgo principled non-voting if there were more choices on the ballot, and getting more choices on the ballot in turn requires supporters of parties outside of the Republican and Democratic duopoly to remain on the voter rolls in order to sign ballot access petitions. Ohio's rule thus drives more voters to avoid the polls *even as it punishes them for it.*

Second, voters who are not registered will not appear on the voter file. *See* Ohio Rev. Code § 3503.15(G). But the public voter file, which includes information like party affiliation, is the primary means by which candidate campaigns and parties, including the Libertarians, reach voters in order to engage and persuade them.[15]

Again, this burden is particularly harmful on smaller parties and their supporters, whose ability to successfully associate and organize depends on the type of information-sharing and signaling that is accomplished by the voter registration database. That is in addition to the broader loss of opportunities to discuss the issues of the day and engage in the real-life back-and-forth of politics; the cost of not being on the rolls includes, for example, the likelihood that a local candidate for town council will walk past a citizen's house rather than knocking on the door and beginning a conversation. Principled non-voters are sending a message of discontent to their political leaders, and Ohio's response is to

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[15] *See, e.g.*, Cummings, *Q&A with Eitan Hersh: how campaigns use data to target voters*, Yale News (Aug. 13, 2015) ("There are three big sources of government records that campaigns rely on. First and foremost are voter registration records."), https://news.yale.edu/2015/08/13/qa-eitan-hersh-how-campaigns-use-data-target-voters.

render them invisible to those very leaders on the campaign trail.[16]

Third, Ohio's rule means that principled non-voting can lead to a voter being excised from measurements of public opinion altogether. Voter registration is a common screen for public polling.[17] The political disempowerment that comes from systematic exclusion from polling results can be quite direct. For example, during the 2016 campaign, polling results determined whether a presidential candidate was able to participate in televised debates.[18] Libertarian candidate Gary Johnson polled in double digits, and ultimately received almost 5 million votes nationwide, and over 150,000 votes in Ohio, but was not permitted to participate in the televised presidential debates. In this way, too, rules like Ohio's, which make it even harder for Libertarians and

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[16] Even voters who have been deemed "inactive" because they did not vote in a single election but who have not yet been purged from Ohio's voter rolls will be identifiable as such in the public voter registration records. *See* Ohio Rev. Code § 3503.26(B) (providing that voter registration records must include "the names and addresses of all registered electors sent confirmation notices and whether or not the elector responded to the confirmation notice"). That alone makes it less likely that candidates and political parties will engage with these voters, obstructing the voters' ability to incorporate their views into the relevant political discourse well before—and regardless of whether—they are ultimately purged from the voter rolls.

[17] *See, e.g.*, Gallup News, *What is the difference between registered voters and likely voters?* ("Registered voters are ... the group whose data Gallup reports most often[.]"), http://news.gallup.com/poll/110287/what-difference-between-registered-voters-likely-voters.aspx.

[18] *E.g.*, Hellman, *Poll: Majority of voters want Johnson on debate stage*, The Hill (Aug. 25, 2016), http://thehill.com/blogs/ballot-box/presidential-races/293324-poll-majority-of-voters-want-johnson-on-debate-stage.

others to have their voices break through, only reinforce the criticisms that lead citizens to engage in principled non-voting.

The significant burdens Ohio's policy places on principled non-voting far outweigh the justifications the State has put forth for the rule. While Ohio surely has an interest in maintaining accurate voter rolls, *e.g.*, *Crawford*, 553 U.S. at 194-197 (Stevens, J., announcing the judgment of the Court), a policy that systematically over-includes principled non-voters, marking them for potential de-registration because of their expression of disfavored political beliefs, is not justified. Ohio's interest in clean voter rolls does not "make it necessary," *Burdick*, 504 U.S. at 434, to impose these myriad burdens on principled non-voters' political rights, especially when the interest in accurate voter rolls could be achieved more effectively through other means. *E.g.*, C.A. Appellant Br. 8-9 & n.2. The "use-it-or-lose-it" rule contravenes First Amendment principles and cannot stand.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2017